

142 FERC ¶ 61,194
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

Essar Steel Minnesota, LLC

v.

Docket No. RP13-313-000

Great Lakes Gas Transmission Limited Partnership

ORDER ON COMPLAINT

(Issued March 21, 2013)

1. On November 27, 2012, Essar Steel Minnesota, LLC (ESML) filed a complaint against Great Lakes Gas Transmission Limited Partnership (Great Lakes) pursuant to Rule 206 of the Commission's Rules of Practice and Procedure,¹ and section 5 of the Natural Gas Act (NGA).² As discussed below, the Commission will dismiss the complaint.

I. Background

2. ESML is a Minnesota limited liability company, which was formerly known as Minnesota Steel Industries, LLC (MSI). On October 22, 2007, Essar Steel Holdings Ltd. acquired all of the membership units of MSI, which was then renamed Essar Steel Minnesota, LLC. Great Lakes is a Delaware limited partnership, which owns and operates 2100 miles of dual, high-pressure pipelines and appurtenant equipment. The Great Lakes pipeline extends from the Minnesota-Manitoba border at Emerson to the Michigan-Ontario border at St. Clair.

¹ 18 C.F.R. § 385.206 (2012).

² 15 U.S.C. § 717d(a) (2012).

3. On September 6, 2006, ESML entered into a transportation services agreement (TSA) with Great Lakes, providing for firm transportation capacity of up to 55,000 dekatherms per day from its Emerson receipt point to its Carlton delivery point for a 15-year period from July 1, 2009 to March 31, 2024.
4. As consideration for these transportation services, ESML agreed to pay the rates indicated in the TSA, which include the maximum reservation rate for the transportation path, as reflected in Great Lakes' tariff. In accordance with Great Lakes' tariff, ESML (then MSI) was deemed to be non-creditworthy and was required to establish credit. As a result, ESML posted a letter of credit equal to three months of reservation charges.
5. In July 2009, Great Lakes invoiced ESML for monthly capacity charges under the TSA, which ESML failed to pay. ESML failed to pay the next two months' reservation charges as well. After the first three months of the TSA, Great Lakes stopped invoicing ESML and drew down ESML's entire letter of credit that it had posted as collateral.
6. On October 29, 2009, Great Lakes sued ESML in federal district court in Minnesota for anticipatory repudiation of the TSA based on ESML's failure to make the first three monthly payments and its contention that ESML had refused to provide assurances that it intended to perform its obligations in the future.

II. ESML's Complaint

7. At the time the TSA was executed, MSI was engaged in a project to develop and construct an integrated steel production facility (the Facility) at an estimated cost of \$1.2 billion on the Mesabi Iron Range in Hibbing, Minnesota. While Great Lakes' pipeline did not extend to the Facility, MSI planned to construct a lateral connection, which would provide some of MSI's transportation needs. ESML states that the first phase of the Facility was expected to be operational in the summer of 2009.
8. According to ESML, its ability to finance construction of the Facility was delayed substantially by the turmoil in the credit markets caused by the global financial crisis. Because of the difficulty in obtaining financing, ESML recognized that it might not complete construction of the Facility in time for commencement of service under the TSA on July 1, 2009.
9. Therefore, ESML states that in February 2009, it notified Great Lakes of its difficulties and attempted to begin discussions aimed at delaying the service commencement date or obtaining other relief. However, according to ESML, Great Lakes unreasonably refused to negotiate in good faith and ultimately sued it for anticipatory repudiation of contract in federal district court. ESML states that Great Lakes is seeking to recover all 15 years' worth of reservation charges totaling \$30 million.

10. ESML's complaint alleges that Great Lakes' conduct in response to its efforts to modify the TSA violates section 5 of the NGA, as well as Great Lakes' tariff, and is unjust and unreasonable. As noted above, ESML argues that Great Lakes refused to negotiate in good faith to reach a mutually agreeable resolution. Among other things, ESML alleges that Great Lakes has accommodated good faith requests in other circumstances. In this regard, ESML suggests that Great Lakes' failure to accommodate its "rational approach" is because Great Lakes "simply wanted to preserve capacity for one of its affiliates."³ Moreover, ESML contends that Great Lakes has been improperly arguing in federal district court that ESML is not a customer, while continuing to identify ESML as a customer on its Electronic Bulletin Board and in its filings with the Commission. Finally, ESML claims that Great Lakes' conduct is tantamount to a termination or suspension of the TSA. However, Great Lakes has not formally terminated or suspended service to ESML, but is not according ESML the rights of a customer under its tariff.⁴

11. ESML asks the Commission to find that Great Lakes has failed to act in good faith in response to ESML's request to modify the terms of the TSA. ESML also asks that the Commission find that Great Lakes has not effectively suspended or terminated service to ESML. Finally, ESML asks the Commission to find that if Great Lakes wants to terminate or suspend service to ESML, it must first provide notice to ESML as required under the tariff, and attempt to remarket the capacity in accordance with Commission precedent.⁵

III. Notice, Interventions, and Answers

12. Public notice of the complaint was issued on November 28, 2012. Interventions and protests were due on December 17, 2012, as provided in section 154.210 of the Commission's regulations.⁶ Pursuant to Rule 214,⁷ all timely filed motions to intervene and any unopposed motion to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. On December 4, 2012, Michigan Consolidated Gas Company filed a motion to intervene. On December 17, 2012, Great Lakes filed an answer to ESML's complaint.

³ ESML Complaint at 8 (citing Attachment 1 at 3).

⁴ *Id.* at 3-4.

⁵ *Id.* at 5.

⁶ 18 C.F.R. § 154.210 (2012).

⁷ 18 C.F.R. § 385.214 (2012).

13. On December 31, 2012, ESML filed a motion for leave to answer and an answer to Great Lakes' answer. On January 15, 2013, Great Lakes filed an answer in opposition to ESML's motion for leave to answer and, in the alternative, a limited response. Rule 213(a) (2) of the Commission's Rules of Practice and Procedure⁸ prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answer of ESML to Great Lakes' answer and Great Lakes' follow-up answer to ESML's answer and will, therefore, reject them.

IV. Great Lakes' Answer to ESML's Complaint

14. Great Lakes responds to ESML's complaint by stating that a breach of contract dispute with ESML has been the subject of litigation in a federal district court in Minnesota for over three years. As a result, Great Lakes argues that ESML should not at this late stage be allowed to use the complaint process at the Commission to try to rewrite its contract to avoid its contractual obligations.

15. Great Lakes emphasizes that the issue of ESML's repudiation of the TSA is currently being considered by the court on summary judgment motions. Indeed, briefing on these motions has been completed and oral argument was held on October 4, 2012. Therefore, Great Lakes argues that the Commission should decline to exercise its jurisdiction and dismiss ESML's complaint. Great Lakes points out that there is ample precedent supporting the proposition that contractual disputes such as this one are resolved in the courts, rather than by the Commission.

16. In this regard, Great Lakes explains that the Commission considers three factors in assessing whether to assert primary jurisdiction over a contract dispute subject to the jurisdiction of another forum: (i) whether it possesses special expertise on the issue which makes it appropriate for Commission decision, (ii) whether the type of question in dispute requires uniformity of interpretation, and (iii) whether the case is important to the Commission's regulatory responsibilities.⁹

17. Great Lakes cites several Commission decisions to support its position that the Commission should not exercise its jurisdiction in this case. First, Great Lakes notes that general allegations that the Commission possesses special expertise in determining the obligations of natural gas companies under the NGA are insufficient to justify primary jurisdiction.¹⁰ This is particularly true where the dispute appears to turn on contract

⁸ 18 C.F.R. § 385.213(a)(2) (2012).

⁹ Great Lakes Answer at 10 (citing *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322 (1979), *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla*)).

¹⁰ *Id.* at 11 (citing *Tennessee Gas Pipeline Co.*, 70 FERC ¶ 61,080, at 61,225 (1995)).

interpretation and equitable principles, and only secondarily on application of the tariff.¹¹ Second, where the relief requested turns upon applying equitable factors reflecting facts of a particular case, the Commission has concluded that there is no need for uniformity of interpretation in such a dispute.¹² The Commission has ruled similarly where there is a contract dispute over the damages resulting from the termination of an agreement.¹³

18. Finally, the issue of whether ESML breached and/or anticipatorily repudiated – or whether any of ESML’s alleged defenses have merit – does not impinge upon the Commission’s jurisdictional responsibilities. As Great Lakes notes, these may be matters that are of significance to the parties, but they are not important in relation to the Commission’s regulatory framework. Under these circumstances, the Commission will conserve its adjudicatory resources, and allow the parties’ disputes to be resolved by a court.¹⁴

19. Great Lakes adds that even if the Commission decides to entertain ESML’s complaint, ESML is not entitled to the relief it seeks. Great Lakes contends that ESML has improperly attempted to repackage its allegations in the federal court litigation as a violation of section 5 of the NGA. In Great Lakes’ view, ESML should not be permitted to use section 5 of the NGA to create a legal defense to a state law breach of contract claim simply because the other defenses heretofore advanced by ESML have been rejected by the court. Great Lakes explains that the court has already rejected ESML’s arguments that its performance under the contract was excused under the doctrines of commercial impracticability and *force majeure*, specifically holding that such concepts would not allow ESML to escape liability for the damages caused by its breach of contract.

V. Commission Determination

20. ESML contends that it is not asking the Commission to address or decide the contractual issues pending in the court litigation. Rather, ESML argues in its complaint that Great Lakes “(i) has treated it unjustly and unreasonably with respect to its request to modify its transportation services agreement; (ii) has unlawfully created ambiguity by making inconsistent – and potentially false – statements to the Commission, and other authorities concerning the nature of ESML’s service; and (iii) has failed, and continues to

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* (citing *Nevada Power Co.*, 111 FERC ¶ 61,111, at 61,616 (2005)).

¹⁴ *Id.* (citing *Farmland Industries Inc. v. Louisiana Intrastate Gas Corp.*, 56 FERC ¶ 61,257, at 61,594 (1991)).

fail, to terminate or continue service as required by Great Lakes' Tariff and the TSA."¹⁵ Based on these allegations, ESML contends that Great Lakes violated section 5 of the NGA and its own tariff and therefore asks the Commission to find that Great Lakes' conduct is unjust and unreasonable under the NGA and order Great Lakes to abide by the unambiguous, express terms of its tariff.

21. In response to ESML's allegations, Great Lakes charges that "every factual and legal assertion made by ESML in the FERC Complaint has been raised by ESML in the Federal Court Litigation, except now they are repackaged in a claimed Section 5 wrapper."¹⁶ Based on a review of the record, the Commission agrees with Great Lakes that ESML's complaint is essentially duplicative of the contractual dispute already before the federal district court. That being the case, the Commission will decline to exercise its jurisdiction based on the three-pronged test of *Arkla*,¹⁷ and will therefore dismiss the complaint. Specifically, the Commission (1) has no special expertise in straight-forward contractual matters, (2) there is no need for uniformity of interpretation when dealing with a contract dispute over damages resulting from the termination of an agreement, and (3) the issue of whether there has been an anticipatory repudiation of the TSA is not important in relation to the Commission's regulatory responsibilities.

The Commission orders:

ESML's complaint is dismissed for the reasons discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁵ ESML Complaint at 1.

¹⁶ Great Lakes Answer at 2.

¹⁷ *Arkla*, 7 FERC at 61,322; see also *Portland General Electric Co.*, 72 FERC ¶ 62,009, at 61,021-22 (1995).